IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 353 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

VARSHAKUMARI INDUKKUMAR MEHTA

Versus

INDUKUMAR RATILAL MEHTA

Appearance:

MR JR NANAVATI for Petitioners.

Mr.A.P. Raval, Advocate, for respondent No.1

MR S.T. Mehta, Addl. P.P., for Respondent No. 2.

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 28/01/97

ORAL JUDGEMENT

The petitioners herein preferred Criminal Miscellaneous Application No.765 of 1985 under Section 125 of the Criminal Procedure Code before the learned Judicial Magistrate, First Class, Rajkot. The petitioners claimed that petitioner No.1 was the wife and petitioners Nos. 2 to 4 were the minor children of the present respondent No.1. Petitioner No.1 claimed that she was being ill-treated and severely beaten by

respondent No.1 and was driven out of her house after taking some signatures on blank papers as well as some document under coercion. She claimed that respondent No.1 was earning around Rs.5,000/- every month. Each of them, therefore, should be awarded a monthly maintenance of Rs.500/-.

The petitioners' claim was contested by respondent No.1. He alleged that petitioner No.1 was living in adultery and petitioners Nos. 2 to 4 were not his children. He further contended that he and petitioner No.1 had taken customary divorce and the petitioners were paid a lump sum amount by way of maintenance and petitioner No.1 had given up the right to maintenance for herself and the children.

The learned Magistrate, who tried the application, held that petitioner No.1 was ill-treated and was driven out of her matrimonial home. He further held that even if the respondent No.1 were believed, petitioner No.1, being a divorced woman, would be entitled to maintenance from respondent No.1. The claim of respondent No.1 that the petitioners were paid a lump sum amount by way of maintenance was held not to have been proved. The learned Magistrate further held that the respondent No.1 earned around Rs.2,000/- every month. The learned Magistrate did not believe that petitioners Nos. 2 to 4 were not the children of respondent No.1. He, therefore, proceeded further to award a monthly maintenance of Rs.250/-; Rs.150/-; Rs.125/- and Rs.100/- to each of the petitioners respectively.

Feeling aggrieved, the respondent No.1 preferred Criminal Revision Application No.56 of 1990 and the petitioners preferred Criminal Revision Application No.61 of 1990 before the learned Additional Sessions Judge, Rajkot. The learned Additional Sessions Judge, considering the deed of divorce, Exhibit 39, took the view that petitioner No.1 had agreed to give up her right to maintenance under the said deed of divorce. He, therefore, held that petitioner No.1 and respondent No.1 were living separate by mutual consent and in view of the provisions contained in Section 125(4) of the Criminal Procedure Code, petitioner No.1 was not entitled to maintenance under Section 125 of the Code. He, therefore, under his common judgment and order dated 30th November, 1991, allowed the Revision Application No.56 of 1990 and dismissed the Revision Application No.61 of 1990. Feeling aggrieved, the petitioners have preferred this petition.

It must be noted that the finding of ill-treatment, harassment, beating and desertion of petitioner No.1, recorded by the learned Magistrate, has not been reversed by the learned Additional Sessions Judge and has thus become final. The only ground, which has appealed to the learned Sessions Judge is the deed of divorce, Exhibit 39, under which petitioner No.1 is purported to have forfeited her right to maintenance.

Learned Advocate Mr.Nanavaty, appearing for the petitioners, has produced before me a copy of the alleged deed of divorce, Exhibit 39. The said deed of divorce has been executed on a stamp paper and is purported to have been signed by petitioner No.1, her parents, respondent No.1 and five other persons. Respondent No.1 has not proved the customary divorce. In absence of proof of customary divorce, the said document cannot be treated as a deed of divorce or that the divorce cannot be said to be a valid divorce. In absence of proof of divorce, the said document cannot be treated as an agreement to live separately either. Petitioner No.1 and respondent No.1 cannot be said to have agreed to live separately as is held by the learned Additional Sessions Judge. Further, the said deed does not mention a word about the lump sum maintenance paid to petitioner No.1 for herself or the minor children. In a similar set of facts, the Kerala High Court in the matter of A.S.N. Nair v. Sulochana (1981 Criminal Law Journal 1898) held :-

> "... If the divorce is shown to be not valid in law, their willingness or consent to reside separately on the basis of a de facto divorce cannot be treated as mutual consent for separate residence as spouses...."

In the present case, petitioner No.1 has alleged that she was compelled to sign certain documents. The learned Additional Sessions Judge has manifestly erred, firstly, in not considering the allegation that petitioner No.1 was compelled to sign certain documents and to decide whether the said document, Exhibit 39, was executed by petitioner No.1 under her free will and without any duress. Secondly, the learned Additional Sessions Judge has not considered whether respondent No.1 had proved customary divorce. In my view, the learned Additional Sessions Judge has erred in considering the said document to be a deed of divorce or an agreement to live separate with mutual consent. Further, even if the factum of

divorce were believed, petitioner No.1 would be entitled to maintenance under Section 125(1) of the Code of Criminal Procedure. Further, in no circumstances, the minor children should have been denied maintenance from their father.

In view of the above discussion, it is declared that the petitioners are entitled to maintenance from respondent No.1. The impugned judgment and order of the learned Additional Sessions Judge allowing Criminal Revision Application No.56 of 1990 is quashed and set aside. Judgment and Order of the learned Magistrate passed in Criminal Miscellaneous Application No.765 of 1985 is restored.

In view of the order made on Criminal Revision Application No.56 of 1990, the learned Additional Sessions Judge dismissed Criminal Revision Application No.61 of 1990 preferred by the petitioners for enhancement in the amount of maintenance awarded by the learned Magistrate. Since the learned Additional Sessions Judge had held that the petitioners were not entitled to maintenance, the claim for enhancement made by the petitioners was not examined at all. The said application is, therefore, required to be remanded to the learned Additional Sessions Judge, Rajkot for hearing and disposal on merits. The order on Criminal Revision Application No.61 of 1990 made by the learned Additional Sessions Judge, Rajkot is, therefore, quashed and set aside. The revision application is remanded to the revisional court for hearing and disposal on merits. Considering that the said application has been preferred as far back as in the year 1990, the revisional court may give due priority to the said application. Petition is allowed. Rule is made absolute.

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(apj)